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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 75

AUGUST J. MILLS, SR.,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF FOR PETITIONER.

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CITATIONS TO OPINIONS BELOW

The refusal by the Supreme Court of Louisiana of the writs sought by petitioner March 3, 1958, not reported but appearing at folio 47 of the certified copy of the transcript of the record filed herewith, and Printed Record, page 51.

The dissenting opinion of Chief Justice John B. Fournet of the Supreme Court of Louisiana, March 3, 1958, appearing at folios 48 and 49 of the certified copy of the transcript of the record filed herewith, and Printed Record, page 51.

The judgment of Hon. J. Bernard Cocke, Judge of Section "E" of the Criminal District Court for the Par-

ish of Orleans, State of Louisiana, February 19, 1958, adjudging petitioner in contempt, appearing in the certified copy of transcript filed herewith at folios 33-38, and Printed Record, page 38.

JURISDICTION

The refusal by the Supreme Court of Louisiana of the writs sought was entered March 3, 1958, as appears from page 47 of certified copy of transcript of record filed herewith and page 51 of Printed Record. Such refusal is final in Louisiana. (*City of Gretna v. Rossner*, 154 La. 117, 97 So. 335) Application for a re-hearing is not permitted.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) as the said refusal is repugnant to the Constitution of the United States being in derogation of rights and privileges guaranteed by Amendments V, IX and XIV thereof.

Conceding that there is jurisprudence to the effect that the first ten Amendments to the Constitution of the United States are not operative in State Courts, (*Maxwell v. Dow*, 176 U.S. 581; 44 L. Ed. 597), we believe with Mr. Justice Harlan (*Huartado v. California*, 110 U.S. 568; 28 L. Ed. 246; *Maxwell v. Dow, supra* at pp. 608 and 607 respectively), and many others, that this jurisprudence originally resulted from a forgetfulness, (real or perhaps dictated by seasonable expedience), of the fact that when these Amendments were adopted

> " • • • the Constitution of each State, with few exceptions, contained and still contains a Bill of Rights, enumerating the rights of life, liberty and property which cannot be impaired by the legislative department."
>
> (Mr. Justice Harlan in the *Huartado* case, *supra.*),

and from the same forgetfulness of the fact that the first ten Amendments to the Constitution merely reaffirmed

> " * * * that the privileges and immunities enumerated in these Amendments belong to every citizen of the United States" and that "they were universally so regarded prior to the adoption of the Fourteenth Amendment."
>
> (Mr. Justice Harlan in *Maxwell v. Dow, supra.*)

By no rule of reason can it be thought that an acknowledged pre-existing state of facts could be so abruptly changed by the adoption of an Amendment (XIV) the very language of which confirms the existence of these facts. Times have changed. There can be no cause now for any adroitly specious reasoning continuing the formerly expedient denial of rights and privileges existing, in what is now the United States, since the landing of the Pilgrim Fathers and which rights were vigorously reaffirmed in 1791.

QUESTIONS PRESENTED

1. Whether the conviction of petitioner for contempt of court resulting from his refusal to answer certain questions before the Grand Jury of the Parish of Orleans, State of Louisiana and after having invoked his constitutional privileges, (Transcript of Record, folios 11-14; Printed Record, pp. 10-14) is repugnant to Amendments V, IX and XIV of the Constitution of the United States of America.

1a. Whether said conviction is repugnant to Amendments V and IX of the United States Constitution, when the answers to questions propounded (Transcript of Record, folios 11-14; Printed Record, pp. 10-14) might have furnished foundation for criminal and civil actions in

the United States Courts against petitioner. (Transcript of Record, folios 29-32; Printed Record, pp. 10-14)

2. Whether the admitted cooperation between the State District Attorney (Parish of Orleans, Louisiana) and various Federal agencies with regard to investigation of public bribery and income tax evasion, (Transcript of Record, folio 16; Printed Record, pp. 15-16), the attendant widespread newspaper, television and radio publicity, (Transcript of Record, folio 15; Printed Record, p. 15), the insinuating tenor of the questions propounded, (Transcript of Record, folios 11-14; Printed Record, pp. 10-14) and the nature of the setting wherein they were propounded (Transcript of Record, folios 11-14; Printed Record, pp. 10-14) justified petitioner in invoking his constitutional privileges against self-incrimination.

3. Whether Section 13, Article XIX, Louisiana Constitution, L.S.A.-R.S. 14:121 and L.S.A.-R.S. 15:468 (Transcript of Record, folios 20-24; Printed Record, pp. 20-26) are repugnant to Section 1, Amendment XIV of the Constitution of the United States in that the purported immunity granted by said statutes is fictitious and restricted, leaving petitioner open to a wide variety (Municipal, State and Federal) of actions (criminal and civil) against him and thereby abridging the privileges and immunities guaranteed him as a citizen of the United States (Transcript of Record, folios 29-32; Printed Record, pp. 33-37).

4. Whether the judgment rendered February 19, 1958 (Transcript of Record, folios 33-38; Printed Record, pp. 38-44) ordering petitioner to answer questions propounded by Grand Jury concerning public bribery was repugnant to Amendments V, IX and XIV of the United States Constitution in that it would force petitioner to testify in effect against himself, he having been

indicted for conspiracy to commit public bribery February 12, 1958. (Transcript of Record, folio 44; Printed Record, p. 49)

STATUTES INVOLVED

Amendments V, IX and XIV (Section 1) of the Constitution of the United States; (Printed Record, pp. 18-19) Article XIX, Section 13, of the Louisiana Constitution; (Printed Record, p. 21) Louisiana Revised Statutes —L.S.A.-R.S. 14:121, R.S. 15:468, and R.S. 15:11. (Printed Record, pp. 21-23)

STATEMENT OF CASE

On January 15, 1958 petitioner appeared before the Orleans Parish Grand Jury and refused to answer certain questions, claiming his "Constitutional Rights, both Federal and State," (Transcript of Record, folios 1, 11, 12, 13 and 14; Printed Record, pp. 1, 10-14) and also stating his fear of "a civil suit or something like that." (Transcript of Record, folios 1 and 13; Printed Record, p. 12)

On January 22, 1958 (Transcript of Record, folios 9-14; Printed Record, pp. 8-14), the Grand Jury for the Parish of Orleans, State of Louisiana, filed a motion seeking to have petitioner adjudged in contempt for declining to answer said questions.

On February 10, 1958, petitioner filed an answer (Printed Record, p. 33) to the motion and rule for contempt in which he averred, among other things, that

> (a) Being compelled to answer the questions under the circumstances and surroundings and fact existing at the time they were propounded would be an abridgement and denial of his

rights under Amendments V, IX and XIV of the Constitution of the United States;

(b) Petitioner and his wife had been and were under investigation by the United States Revenue Service and others; had been required to sign waivers of prescription; and, at the time of the questions, eleven indictments had been returned by the United States Grand Jury against members of the New Orleans Police Department, three for income tax evasion and eight for perjury or false statements; (Transcript of Record, folios 15-16; Printed Record, pp. 14-15).

(c) The so-called immunity extended by the District Attorney is limited strictly to offenses against bribery statutes and does not extend to anything else, is purely conditional, not binding on any successor, and, consequently, if petitioner were forced to answer the questions declined, and those that would inevitably follow, it would be a violation of the provisions of the Constitution of the United States, particularly Section 1 of Amendment XIV thereof; (Transcript of Record, folios 22-23 and 32; Printed Record, pp. 24-26 and 36).

(d) The cooperation existing between the District Attorney for the Parish of Orleans, the Police Bureau of Investigation, the United States Attorney for the Eastern District of Louisiana, the Internal Revenue Service of the United States and its investigators, as attested by the eleven Federal indictments noted above in paragraph (b), the sixty odd criminal cases

(not bribery) filed in the Criminal District Court for the Parish of Orleans against individuals allegedly engaged in business similar to that insinuated to petitioner; the seven suits for occupational licenses, for business similar to that insinuated to petitioners, each for well over a thousand dollars, on file in the Civil District Court for the Parish; and, the insinuating tenor of some of the questions propounded with reference to petitioner's son and brother were **facts and circumstances** ample to cause petitioner to fear that any answer to the questions propounded, and others that would inevitably follow, might tend to incriminate him and afford a link in a chain of evidence which could become the basis of proceedings, criminal and civil, against him under the laws of the United States and the State of Louisiana for matters unrelated to bribery and for which there existed no immunity statutes, and ample cause for him to declare that forced answers would be an abridgement of his constitutional rights under Amendments V, IX and XIV of the Constitution of the United States. (For District Attorney cooperation, etc. see Transcript of Record, folio 16; Printed Record, pp. 15-16). For insinuating questions,—Transcript of Record, folios 11-12; Printed Record, pp. 11-12, Unenumerated Rights—Transcript of Record, folio 25—Printed Record, pp. 28-32.)

(e) Any doubt should be resolved in favor of petitioner (*Quinn v. U. S.*, 75 S. Ct. 668, *Hoffman v. U. S.*, 341 U.S. 479) or the very pur-

pose of the privilege would be frustrated. (32 L.R.A. 133).

On February 10, 1958, an agreed Stipulation of Facts was filed, (Transcript of Record, folios 9-17, Printed Record, pp. 8-17), the matter was argued, taken under advisement, and, on February 19, 1958, Judge J. Bernard Cocke of Section "E" of the Criminal District Court for the Parish of Orleans, State of Louisiana, rendered a judgment (Transcript of Record, folios 33-38; Printed Record, pp. 38-44) ordering petitioner to answer the questions propounded by the Grand Jury, to which ruling petitioner seasonably reserved Bill of Exception No. 1 (Transcript of Record, folio 39) reiterating his plea of the ruling's repugnance to Amendments V, IX and XIV of the Constitution of the United States. Petitioner again declined to answer the questions for the same reasons, was adjudged in contempt, filed a Motion for a New Trial (Transcript of Record, folio 41; Printed Record, p. 46) which was overruled and Bill of Exception No. 2 reserved, reiterating former pleas, (Transcript of Record, folio 42; Printed Record, p. 47), was sentenced to serve ten (10) days in the Parish Prison, pay a fine of $100.00, and in default thereof serve an additional ten (10) days (Transcript of Record, folio 5; Printed Record, p. 5) and filed Notice of Intention to Apply for Writs (Transcript of Record, folios 5 and 43; Printed Record, pp. 5 and 49).

One week prior to conviction and sentencing of petitioner, February 12, 1958, the Grand Jury for the Parish of Orleans found an indictment against him for conspiring with others "to commit the crime of Public Bribery" which was filed with the Criminal District Court for the Parish of Orleans under No. 159-238. (Transcript of Record, folio 44; Printed Record, p. 49)

Application for Certiorari, Mandamus and Prohibition was filed with the Supreme Court of Louisiana February 25, 1958 (Transcript of Record, folio 1; Printed Record, p. 1) urging, among other things, the repugnance of the ruling and judgment of the District Court to Amendments V, IX and XIV of the Constitution of the United States.

On March 3, 1958 the Supreme Court of Louisiana refused the writs, Chief Justice John B. Fournet and Justice James D. Simon dissenting. (Transcript of Record, folio 47; Printed Record, p. 51). Chief Justice Fournet filed a dissenting opinion (Transcript of Record, folios 48-49; Printed Record p. 51) in which he said:

> "Moreover, it is my opinion that the relator is entitled to the protection offered by the 5th and 14th amendments to the Constitution of the United States under the showing made".

On March 3, 1958 a Motion For Stay of Execution was filed with the Supreme Court of Louisiana and petitioner was granted 90 days within which to petition the Supreme Court of the United States for writ of certiorari, contingent upon bond for $200.00 being furnished, (Transcript of Record, folios 50-52) and the bond was so furnished. (Transcript of Record, folio 53)

ARGUMENT

1. The conviction and sentencing of petitioner (Transcript of Record, folios 5 and 33-38; Printed Record, pp. 5 and 38-44) for contempt violates his privilege against self-incrimination (U.S. Const. Amend. V) because:

> (a) The questions he declined to answer, (Transcript of Record, folios 1, 11-14; Printed Record,

pp. 1 and 10-14) and those that inevitably would have followed, were such that the answers thereto not only would have subjected him to possible criminal prosecution in the courts of the United States, but, also, would have tended to incriminate him.

> "Privilege against self-incrimination is not limited to admissions that would subject witness to criminal prosecution but also extends to admissions that might only tend to incriminate. U.S.C.S. Const. Amend. 5."
> *Emspak v. U. S.*, 75 S. Ct. 687.

(b) Answers to questions propounded "could have well furnished" links "in the chain of evidence needed to prosecute the witness for a federal crime", (quotes from *Emspak* case, *supra* and *infra*), especially when petitioner had signed waivers of prescription with Federal authorities. (Transcript of Record, folios 15-16; Printed Record, pp. 14-17)

> "Questions concerning witness' associations fell within scope of privilege against self-incrimination, where to have revealed knowledge about named individuals, all of whom had been previously charged with the Communist affiliations, could have well furnished a link in the chain of evidence needed to prosecute the witness for a federal crime, ranging from conspiracy to violate Smith Act to filing of false non-communist affidavit under Taft-Hartley Act.
>
> " 'To sustain the privilege', this Court has recently held, 'it need only be evident from the implications of the question, in the setting in which it is asked, that a respondent answer to the question or an explanation of why it can-

not be answered might be dangerous because injurious disclosure could result', and nearly 150 years ago Chief Justice Marshall enunciated a similar test: 'Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compelled to furnish any one of them against himself'."

Emspak v. U. S., supra.

(c) Petitioner is the sole judge of whether the answers would criminate him, he alone knowing what they would be.

"* * * if the question be of such description that an answer to it may or may not criminate the witness, according to the purport of that answer, **it must rest with himself,** who alone can tell what it would be, to answer the question or not. If in such a case, he says upon his oath that his answer would criminate himself, **the court can demand no other testimony of the fact."**

Chief Justice Marshall in:

U. S. v. Aaron Burr, Fed. Cas. No. 14,692e. (emphasis ours)

2. The admitted cooperation between the State District Attorney and various Federal agencies with regard to investigation of public bribery and income tax evasion, (Transcript of Record, folio 16; Printed Record, pp. 15-16), the raging newspaper, television and radio publicity concerning this investigation, (Transcript of Record, folio 15; Printed Record, p. 15), the insinuating tenor of the questions propounded, (Transcript of Record, folios 11-14; Printed Record, pp. 10-14), and the inquisitorial nature of the setting wherein they were propounded

(Transcript of Record, folios 11-14; Printed Record, pp. 10-14) were such facts and circumstances as to cause petitioner to fear that any answers might be found to be incriminating, (*Emspak v. U. S., supra*), and that the privilege against self-incrimination was under wrongful attack.

> "It is when the privilege of self-incrimination is **under attack** by those who **wrongfully conceive** of it as merely a **shield for the guilty** that **governmental bodies must be most scrupulous in protecting its exercise.**" (Emphasis ours)
> *Quinn v. U. S., supra.*

3. (a) Section 13, Article XIX of the Constitution of the State of Louisiana (Printed Record, p. 21; Transcript of Record, folio 20) limits the immunity offered petitioner to the non-use, "in any judicial proceedings", of his testimony given "in any lawful proceeding against any one who may be charged with having committed the offense of bribery" (Quotes from Art. XIX, sec. 13, La. Const.), and any other interpretation or application, such as the herein judgment and conviction, is repugnant to Section 1, Amendment XIV, U. S. Constitution, and abridges petitioner's privilege of due process of law and his privilege against self-incrimination, each of which, among others, he enjoys as a citizen of the United States, because the proceeding at which petitioner's testimony was sought was a Grand Jury investigation and NOT a proceeding against any one "**charged** with having committed the **offense** of **bribery**" (Quotes from Art. XIX—emphasis ours) or any other offense. (Transcript of Record, folios 11-14; Printed Record, pp. 10-14)

(b) The immunity offered by L.S.A.-R.S. 14:121 (Printed Record, pp. 21-22; Transcript of Record, folio 20) is limited to "the **offender,** under the public bribery etc. articles" who gives a sworn statement to the "**Dis-**

trict Attorney charged with the **prosecution** of the **offense"** (Emphasis ours), and who later "gives evidence tending to convict any other offender under those articles"; and the granting of this immunity is solely "at the discretion of said district attorney" and **only** for "the offense reported". (All quotes from R.S. 14:121; emphasis ours). From the Stipulation of Facts (Transcript of Record, folios 9-17; Printed Record, pp. 8-17) and the entire record herein it is apparent that the petitioner was NOT an "offender", the Grand Jury was NOT "the District Attorney", and the District Attorney was NOT engaged "with the prosecution of the offense". Interpreting R.S. 14:121 as applicable herein is certainly enforcing a law which abridges the privileges and immunities enjoyed by petitioner, (among which are those against self-incrimination and those unenumerated rights guaranteed by Amendment IX of the U. S. Constitution), and such interpretation is repugnant to Section 1, Amendment XIV of the U. S. Constitution.

(c) L.S.A.-R.S. 15:468 (Printed Record, pp. 22-23) is just as specific, stating that a "person may be compelled to testify" but **only** "in any lawful proceeding against another charged with commercial bribery, etc." As pointed out above, the attempt to make petitioner's refusal to answer not justified by these statutes is a flagrant abridgement of his constitutional privileges and immunities.

By no stretch of the imagination can these statutes be said to grant immunity for offenses against municipalities, states or the Federal government, and the law books and reports are replete with authorities to the effect that a witness is not guilty of contempt when the only security offered is of such nebulous and impossible nature.

"Although there are some earlier cases to the contrary, it is generally held that, under **immunity statutes providing only that testimony** given by a witness **shall not be used against him** in a criminal prosecution, one may stand upon his constitutional guaranty against being compelled to give incriminatory testimony and **refuse to testify when his testimony might furnish leads** to other testimony which would convict him." (Emphasis ours)

58 Am. Jur. Witnesses p. 76, Sec. 90 (and numerous cases cited, including *Arndstein v. McCarty*, 245 U.S. 71, 65 L. Ed. 138; *Counselman v. Hitchcock*, 142 U.S. 547, 35 L. Ed. 1110)

"But by the **weight of authority** and **better reason,** he will **not be compelled** to answer if the **only security** he has is that his **testimony** will **not be used against him,** since it may disclose **offenses hitherto unknown** and lead to the discovery of other evidence whereby he may be convicted." (Emphasis ours)

24 L.R.A., NS, 168, (citing *Counselman v. Hitchcock, supra,* and others).

" 'To sustain the privilege' this Court has recently held, 'it need only be evident from the implications of the question, in the setting in which it is asked, that a **respective answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result'.** And nearly 150 years ago Chief Justice Marshall enunciated a similar test: 'Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of **the rule that no witness is compelled to furnish any one of them against himself'.**"
Emspak v. U. S. (supra)

From the foregoing citations it is apparent that the constitutional guaranty against self-incrimination is far reaching; that it must be accorded a liberal construction (*Hoffman v. U. S., supra*), especially when it is under attack through a wrong conception of its true meaning. (*Quinn v. U. S., supra*)

As far back as *U. S. v. Aaron Burr*, Fed. Cas. No. 14,692e (see also *Ex parte Butt*, 93 S.W. 992), Chief Justice Marshall announced:

> " * * * if the question be of such description that an answer to it may or may not criminate the witness, according to the purport of that answer, **it must rest with himself,** who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, **the court can demand no other testimony of the fact".**

And, even though it has been shown in 24 L.R.A., NS, 169 (citing *Ex parte Butt, supra,* and *Ex parte Senior*, 32 L.R.A. 133) that:

> "A witness cannot be required to show how an answer will criminate him, otherwise the **purpose of the privilege would be frustrated"**

we will show by possible hypothetical cases what far reaching injury could result from the denial of this constitutional privilege to a witness.

EXAMPLE 1. Witness X, before a Grand Jury investigating public bribery is told that he has immunity under the statutes noted above, and the following ensues:

Q. Do you know police officers A & B?

A. Yes.

Q. Did you ever give them any money?
A. Yes.

Q. For what purpose?
A. So they wouldn't raid my gambling house.

What happens now? X is not charged with bribery but he is charged with R.S. 14:90, the gambling statute. His testimony is not used against him but the testimony of A. and B. is, together with such other evidence as might have been discovered as a result of his answers to the Grand Jury. Result? X is convicted of an offense of which the Grand Jury had no knowledge until drawn from X under pretext of immunity.

EXAMPLE 2. Policeman A has been shot and killed by a person or persons unknown. Witness X appears before a Grand Jury investigating public bribery. He is lulled into a sense of security with the immunity routine and this ensues:

Q. Did you ever pay any money to any policeman?
A. Yes.

Q. To whom?
A. Policeman A.

Q. Why?
A. So he wouldn't raid my handbook?

Q. What did he do with the money?
A. He didn't do anything but raise hell that it wasn't enough.

Q. Did you give him any more?
A. No. He started to arrest me and I shot him.

Need anything more be added save but to observe that,

except for this blanket of spurious immunity with which the Grand Jury wrapped witness X, the killer of policeman A would still be a person unknown.

EXAMPLE 3. This is based on an actual question appearing on page 2 of Exhibit A which defendant refused to answer claiming his U. S. and State Constitutional rights. The question will appear as propounded by Mr. Nelson, Assistant District Attorney, and the answer will be as it might have been after District Attorney Hubert extended the restricted immunity on page 11 of Printed Record.

Q. Mr. Mills, as you already know, this Jury is inquiring into the lottery operation from 1950 to 1955 and that is what we would like to talk to you about. What was your employment from 1950 to 1955?

A. I had the Golden Bell Lottery.

What harm could result from that answer? A very considerable harm. Acting on the information that Mills operated under the trade name Golden Bell, investigators checked the records and discovered that he had not registered as an individual operating under a trade name as required by R.S. 51:281. Thereupon, charges are filed against Mills for violation of R.S. 51:281, the number of said charges being restricted only by the number of dates and locations uncovered by the investigators. And these charges would never have been made but for the information given by Mills under the supposed cloak of immunity.

It is suggested that this is a remote possibility? Not so! The records of the Criminal District Court for the

Parish of Orleans show that the identical thing happened in over sixty cases:

State of Louisiana v. Jules Crovetto,
Nos. 149-288 through 298;
State of Louisiana v. Michael Callia,
Nos. 149-340 through 351;
State of Louisiana v. L. Forsyth,
Nos. 149-434 through 450;
State of Louisiana v. Harold Mills,
Nos. 149-505 through 516;
State of Louisiana v. A. J. Mills, Jr.,
Nos. 149-277 through 288.

All of these are prosecutions for violation of R.S. 51:281. With this array of cold, hard facts confronting him, can the witness be blamed for invoking his Constitutional rights and declining to answer? And, in the face of the pronouncements of the Supreme Court of the United States from the time of Chief Justice Marshall (*Burr* case, *supra*) to the present time (*Emspak v. U. S., supra*) can the witness be adjudged in contempt for invoking his privilege? We submit that his rights cannot thus be abridged, and "the purpose of the privilege" thus "frustrated". (*Ex parte Senior, supra*)

4. The judgment complained of was rendered February 19, 1958. (Transcript of Record, folios 33-38; Printed Record, pp. 38-44) One week prior thereto, February 12, 1958, petitioner was indicted for conspiracy to commit public bribery. (Transcript of Record, folio 44; Printed Record pp. 49-50) The judgment and sentence speak for themselves as a flagrant attempt to impinge upon the Constitutional guaranties which petitioner had invoked. (Amendment V, U. S. Const.)

5. Amendment IX, U. S. Const. reads:

"The enumeration in the Constitution of certain

rights shall not be construed to deny or disparage others retained by the people".

"The Ninth Amendment announces and acknowledges in a single sentence that (1) the individual, and not the State, is the source and basis of our social compact and that sovereignty now resides and has always resided in the individual; (2) that our Government exists through the surrender by the individual of a portion of his naturally endowed and inherent rights; (3) that every one of the people of the United States owns a residue of individual rights and liberties which have never been, and which are never to be surrendered to the State, but which are still to be recognized, protected and secured; and (4) that individual liberty and rights are inherent, and that such rights are not derived from the Constitution but belong to the individual by natural endowment". (*The Forgotten Ninth Amendment*, p. 1, Bobbs-Merrill, publishers)

The Ninth Amendment applies to the States. (*Eilendecker v. District Court*, 134 U.S 31, 33 L. Ed. 801; *Palko v. Connecticut*, 302 U.S. 319, 82 L. Ed. 288).

What are some of the unenumerated rights? Since there is no list of them, we must resort to hypothesis.

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such right, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a depotism."
>
> *Savings & Loan Assn. v. Topeka*, 87 U.S. 686, 22 L. Ed. 455
>
> *Everson v. Bd. of Education*, 330 U.S. 1, 91 L. Ed. 711 (718).

Suppose that Louisiana or any other State should enact a statute providing for imprisonment for ordinary debt. There is no guaranty in either the U. S. or Louisiana Constitutions which prohibits imprisonment for debt, but is there any doubt but that the Supreme Court of Louisiana, and certainly the United States Supreme Court would declare such a statute void?

(*Forgotten Ninth Amendment*, pp. 51-52 (*supra*).

"The right of privacy may be such a right. If there is such a right, it is difficult to classify it under any right that is enumerated in the Constitution. This is a right which is of comparatively recent recognition. Some courts call it a fundamental right. While the courts seem to feel that it should exist, there is a great timidity and lack of forthrightness in the protection of this right, because its existence is not to be found in the written and enumerated law."

The Forgotten Ninth Amendment, p. 55 (*supra*).

Suppose Louisiana or any State should enact a statute enabling one with a fancied claim against another to require that other person to disclose to him all details of their transactions PRIOR to the filing of a suit. There is no prohibition in any Constitution against such ridiculous procedure, but the right of privacy as to business transactions until aired by **due process of law** is inherent in all individuals. Is there any doubt as to what the Supreme Courts would do with such a statute?

Yet, that is exactly the situation here. If petitioner were forced, under the provisions of the Louisiana Constitution and Revised Statutes relied upon by the Grand Jury for the Parish of Orleans, to answer the question about his occupation during 1950 to 1955 (Transcript of Record, folio 13; Printed Record, p. 13) and other ques-

tions that would have followed, the provisions relied upon by the Grand Jury would in effect become just such a hypothetical statute as suggested above, for petitioner might lay himself open to a multiplicity of legal actions, including suits by the United States Government for income tax, gambling tax, gambling stamp, etc. etc., which never would have been instituted but for his answer extracted under that cloak of fancied immunity.

That this is not a remote possibility is shown by the Docket of the Civil District Court for the Parish of Orleans containing suits for occupational license for occupations similar to that suggested by the questions propounded to defendant, with the following numbers, names and amounts:

340-598
City of New Orleans v. Philip James Melancon $1982.49

340-632
City of New Orleans v. Dennis J. Melancon 3982.30

337-291
City of New Orleans v. August J. Mills, Jr. 8778.00

342-835
City of New Orleans v. Jules Crovetto 3750.00

350-474
City of New Orelans v. Lucius Forsyth 9000.00

350-611
City of New Orleans v. Andrew Dominguez 5985.39

338-078
City of New Orleans v. Paul J. Portes .....

(Printed Record, pp. 16-17)

It is certainly not contempt to repulse this adroitly circumlocutory invasion of the inherent right of privacy guaranteed by Amendment IX of the U. S. Constitution.

CONCLUSION

For the foregoing reasons, and because

> "The constitutional guaranty against self-incrimination must be accorded **liberal construction in favor of the right** it is intended to secure." (Emphasis ours)
>
> *Hoffman v. U. S.*, 341 U.S. 479, 95 L. Ed. 1118.

it is submitted that the judgment of the Supreme Court of Louisiana should be reversed and the cause remanded in order that petitioner be discharged without date.

Respectfully submitted,

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CERTIFICATE OF SERVICE

MILO B. WILLIAMS, Attorney, and a member of the Bar of this Court hereby certifies that a copy of the above Brief has been served on Richard A. Dowling, Esq., District Attorney for the Parish of Orleans, and upon Jack P. F. Gremillion, Esq., Attorney-General for the State of Louisiana by United States Mail by depositing same in the United States Mailbox with first-class postage pre-paid, addressed to said counsel at their respective postoffice addresses.

MILO B. WILLIAMS,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

Nos. 74 AND 75.—OCTOBER TERM, 1958.

Henry J. Mills and Osmond J. Litolff, Petitioners, 74 *v.* State of Louisiana. August J. Mills, Sr., Petitioner, 75 *v.* State of Louisiana.	On Writs of Certiorari to the Supreme Court of Louisiana.

[June 8, 1959.]

PER CURIAM.

The judgments are affirmed. *Knapp* v. *Schweitzer*, 357 U. S. 371.

MR. JUSTICE BRENNAN joins the Court's opinion, reiterating his belief, expressed in *Knapp* v. *Schweitzer*, 357 U. S. 371, 381, that reconsideration of the holding in *Feldman* v. *United States*, 322 U. S. 487, is inappropriate in this case. He also reiterates his belief that nothing in this decision forecloses reconsideration of the *Feldman* holding in a case presenting the issue presented by *Feldman*.

SUPREME COURT OF THE UNITED STATES

NOS. 74 AND 75.—OCTOBER TERM, 1958.

Henry J. Mills and Osmond J. Litolff, Petitioners, 74 v. State of Louisiana.	On Writs of Certiorari to the Supreme Court of Louisiana.
August J. Mills, Sr., Petitioner, 75 v. State of Louisiana.	

[June 8, 1959.]

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur, dissenting.

In *Knapp* v. *Schweitzer*, 357 U. S. 371, the Court left open the question whether in the case of collaboration between state and federal officers a witness could successfully assert the federal privilege against self-incrimination in a state proceeding. In my view, that question should be answered here for the records in these cases show such collaboration. Yet the majority of the Court ignores the question in affirming without opinion. Therefore, although I agree with and join the dissenting opinion of MR. JUSTICE DOUGLAS, I add these additional views.

The petitioners in these cases were held in contempt for failure to answer questions before a state grand jury investigating the bribery of police officials of New Orleans by persons conducting lottery operations within that city. From the nature of the questions asked petitioners, it is evident that they were suspected of engaging in lotteries and giving bribes. The District Attorney of the Parish of Orleans, under authority granted by state statute, offered petitioners full immunity from state prosecution for crimes, other than perjury, uncovered by the questioning. Nevertheless, petitioners refused to answer ques-

tions relating to bribery and their connections with lottery operations, pleading in justification of this refusal the federal privilege against self-incrimination.

The contempt proceedings and the state court reviews were had upon an agreed statement of facts. These stipulations recited that during the pendency of the state grand jury investigation "the Intelligence Division, Internal Revenue Service of the United States, the United States Attorney for the Eastern District of Louisiana and the United States Grand Jury [had] been for several months and [were then] engaged in investigating some of the members of the New Orleans Police Department for income tax evasion, a felony under the laws of the United States." In addition, the parties agreed that these investigations were well publicized and that, at the time of the instant proceedings, a number of federal income tax indictments had been returned against police officers. Further, it was established that each of the petitioners had been requested to execute, and had executed, waivers of the statute of limitations on their federal tax liabilities for most of the years in question. Lastly, the parties stipulated:

> "That there has existed, and now exists [at the time of the State proceeding], cooperation and collaboration between the District Attorney for the Parish of Orleans and the United States Attorney for the Eastern District of Louisiana and the Internal Revenue Service of the United States of America and its investigators, as well as with the Police Bureau of Investigation of the City of New Orleans in reference to members of the New Orleans Police Department regarding public bribery and income tax evasion and that the Honorable Leon D. Hubert, Jr., District Attorney for the Parish of Orleans, has held conferences with the United States Attorney for the Eastern District of Louisiana regarding public bribery on the

part of certain members of the New Orleans Police Department and income tax evasion, felonies under the law of the United States of America and the State of Louisiana."

In *Knapp* v. *Schweitzer*, *supra*, which decided that the federal privilege against self-incrimination may not ordinarily be raised in a state proceeding, the Court said:

> "Of course the Federal Government may not take advantage of this recognition of the States' autonomy in order to evade the Bill of Rights. If a federal officer should be a party to the compulsion of testimony by state agencies, the protection of the Fifth Amendment would come into play. Such testimony is barred in a federal prosecution, see *Byars* v. *United States*, 273 U. S. 28. Whether, in a case of such collaboration between state and federal officers, the defendant could successfully assert his privilege in the state proceeding, we need not now decide, for the record before us is barren of evidence that the State was used as an instrument of federal prosecution or investigation. Petitioner's assertion that a federal prosecuting attorney announced his intention of cooperating with state officials in the prosecution of cases in a general field of criminal law presents a situation devoid of legal significance as a joint state and federal endeavor." 357 U. S., at 380.

I dissented from that decision on the ground that the state court had decided that the federal privilege did not obtain on the seemingly false premise that information adduced in the state proceeding could not be used against the petitioner in a subsequent federal prosecution. But even accepting, for the purpose of argument, the validity of the *Knapp* result, I am of the view that the question which was not answered there should be considered here and resolved in favor of the petitioners.

The *Knapp* decision when taken in conjunction with *Feldman* v. *United States*, 322 U. S. 487, means that a person can be convicted of a federal crime on the basis of testimony which he is compelled to give in a state investigation. This opens vast opportunities for calculated efforts by state and federal officials working together to force a disclosure in a state proceeding and to convict on the basis of that disclosure in a federal proceeding. Such opportunities will not go unused unless the courts are vigilant to protect the rights of persons who find themselves faced with such coaction of federal and state prosecuting agencies. Such vigilance becomes increasingly required as the Federal Government, through prosecutions for tax evasion, moves into the criminal areas regulated by the States.*

In the instant case the record shows clearly that state and federal authorities had launched a coordinated investigation into the suspected bribery by gamblers of New Orleans' police officers. The State was interested primarily in the enforcement of its public bribery statutes. The Federal Government sought to apprehend tax evaders. The state and federal agencies involved in this two-fold investigation collaborated to obtain desired ends. Policemen suspected of taking bribes and gamblers suspected of giving them were called for questioning. Both were in jeopardy of prosecution: the police under state statute for taking bribes and under federal statute for income tax evasion; the gamblers under state statute for giving bribes and under federal statutes for income tax evasion and for failure to pay the special stamp and excise taxes levied on gambling operations. Doubt which might

*Cf. *Commissioner* v. *Wilcox*, 327 U. S. 404; *Rutkin* v. *United States*, 343 U. S. 130; *United States* v. *Calamaro*, 354 U. S. 351; *Rollinger* v. *United States*, 208 F. 2d 109; *Berra* v. *United States*, 221 F. 2d 590; *Schira* v. *Commissioner*, 240 F. 2d 672; *United States* v. *Wampler*, 5 F. Supp. 796; *United States* v. *Iozia*, 104 F. Supp. 846.

have existed concerning federal interest in petitioners' possible tax evasions was removed when petitioners were induced to waive the statute of limitations for relevant tax years.

The opinion in the *Knapp* case states that the protection of the Fifth Amendment comes into play if a federal officer is a party to the compulsion of testimony by a state agency. 357 U. S. 371, 380. The threshold question then is whether the requisite relationship existed between the State District Attorney and the United States Attorney and Internal Revenue agents. The stipulation, when read in the light of the known facts, adequately shows that federal officers participated in the state action which sought to compel the testimony of petitioners. That stipulation, signed by the state prosecutor, admits of "cooperation," "collaboration," and "conferences." These terms viewed against the background of contemporaneous investigations by a federal grand jury, a state grand jury, the Police Bureau of Investigation of the City of New Orleans, and the Intelligence Division of the Internal Revenue Service, all pointed at a group of persons which included petitioners, requires the conclusion that the State was used as an instrument of federal investigation.

I come then to the question left open in the *Knapp* case: whether, where, as here, a State is used as an instrument of federal investigation, witnesses can successfully assert their federal privilege against self-incrimination in state proceedings. *Knapp* v. *Schweitzer*, *supra*, suggests that where testimony is compelled in such circumstances, the testimony would be inadmissible in a subsequent federal prosecution. See *Byars* v. *United States*, 273 U. S. 28. See also *Feldman* v. *United States*, 322 U. S. 487, 494. But this is only partial protection. To compel testimony in a federal investigation, a witness must be assured at the outset complete immunity from any prose-

cution which might result from his compelled disclosures. *Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591; *Blau* v. *United States*, 340 U. S. 159; *Ullmann* v. *United States*, 350 U. S. 422, 430. There is no indication that such protection obtains here—that petitioners are protected from federal prosecutions which might result from their testimony even though that testimony is not admissible in the subsequent proceeding. *Byars* v. *United States*, *supra*, merely prohibits the introduction of illegally seized evidence and *Knapp* v. *Schweitzer*, *supra*, and *Feldman* v. *United States*, *supra*, speak merely of the non-use of the compelled testimony in a subsequent federal prosecution. None of these cases deals with the fruits of the compelled testimony, and defendants, like petitioners, who are forced to testify under circumstances similar to those here present, are left without the protection against self-incrimination intended by the Constitution. These cases, in my opinion, should be extended to prohibit any prosecution resulting from disclosures compelled under circumstances similar to those which exist here. But this is not an established principle and a witness is entitled to more than hopes of immunity when federal agencies seek to compel incriminatory testimony. Therefore, in my view, petitioners properly invoked their federal privilege against self-incrimination in the present proceeding and the contempts should be discharged. Cf. *Rea* v. *United States*, 350 U. S. 214; *Barthus* v. *Illinois*, 359 U. S. 121, 164 (dissenting opinion).

SUPREME COURT OF THE UNITED STATES

Nos. 74 AND 75.—OCTOBER TERM, 1958.

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August J. Mills, Sr., Petitioner, 75 *v.* State of Louisiana.	

[June 8, 1959.]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK concur, dissenting.

Petitioners in these cases were summoned before a state grand jury in New Orleans and interrogated concerning bribery of public officials and income tax evasion. They were at the time being investigated by the Federal Internal Revenue Service. Accordingly, they objected to the questions, invoking the Fifth Amendment and stating that the answers to the questions would tend to incriminate them. Their objections were overruled and they were held in contempt for refusal to answer. The Supreme Court of Louisiana refused writs of certiorari, mandamus, and prohibition, finding "no error of law in the ruling complained of." The cases are here on petitions for certiorari. 358 U. S. 810.

It has been the prevailing view since *Twining* v. *New Jersey*, 211 U. S. 78, that the guaranty of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" is not made applicable to the States through the Fourteenth Amendment. *Adamson* v. *California*, 332 U. S. 46. Under the *Twining* rule, the Louisiana courts, therefore, need not bow to the

Fifth Amendment as a requirement read into state law by the Bill of Rights.

That is not, however, the end of our problem. For the question remains whether a state court can override a claim of *federal* right seasonably raised in the state proceeding, when the failure to recognize the *federal* right will result in its destruction or nullification.

The classical case involves a *federal* right in the conduct of a business, as in the case of the contractor in *Leslie Miller, Inc.* v. *Arkansas*, 352 U. S. 187, who, having been the successful bidder for federal construction work, could not be subjected to conflicting state licensing requirements. Related cases are in the class of *Service Storage & Transfer Co.* v. *Virginia*, 359 U. S. 171, and *Castle* v. *Hayes Freight Lines*, 348 U. S. 61, which hold that an interstate motor carrier certificate issued by the Interstate Commerce Commission could not be overridden in state proceedings. Litigants asserting federal rights as the basis of a claim (*Testa* v. *Katt*, 330 U. S. 386) or as a defense to a claim under state law (*Miles* v. *Illinois Central R. Co.*, 315 U. S. 398) may do so in state courts which must recognize and protect the federal rights. Chief Justice White stated it as the "duty resting upon" state and federal courts "to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose." *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211, 223. Litigants, resting on a *federal* right, need not resort to federal courts to protect those rights where those rights are put in jeopardy in state proceedings.

There is no more apt illustration of that principle than the present case. The Fifth Amendment to the Constitution reserves a twofold *federal* guarantee for every citizen. It protects him from being forced to give testimony in any federal proceeding, criminal or civil (*Counselman*

v. *Hitchcock*, 142 U. S. 547, 562; *McCarthy* v. *Arndstein*, 262 U. S. 355, 266 U. S. 34), judicial, investigative or administrative (*Quinn* v. *United States*, 349 U. S. 155, 161; *Smith* v. *United States*, 337 U. S. 137), which might tend to incriminate him. And it also assures that no incriminating information adduced from a defendant involuntarily by anyone, anywhere, may be admitted into evidence against him in any federal prosecution. *Bram* v. *United States*, 168 U. S. 532; *Wan* v. *United States*, 266 U. S. 1. It was to this second principle that the ruling of this Court in *Feldman* v. *United States*, 322 U. S. 487, was unfaithful. As long as that decision is adhered to, the evidence obtained in a state proceeding such as the one in this case can be used in a federal prosecution. It is, therefore, too late to protect the *federal* right if one waits for action by the federal court. The *federal* right is lost irretrievably, if it is not saved by the state court. As stated by the Supreme Court of Michigan in *People* v. *Den Uyl*, 318 Mich. 645, 651:

> "It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution."

If the dissent in *Feldman* v. *United States*, *supra*, had prevailed and testimony compelled from a witness in a state proceeding had been barred from use against him when he became a defendant in a federal proceeding, protection of the *federal* right against self-incrimination could be left to the federal courts. But *Feldman*, until it is overruled, controls the regimes under which state investigations are made and federal prosecutions conducted. As long as it is on the books the only place a witness, who is being examined in state proceedings about

matters that may incriminate him under federal laws, can protect his rights against self-incrimination under the Fifth Amendment is in the state courts.

Knapp v. *Schweitzer*, 357 U. S. 371, is contrary to the disposition I would make of the present cases. But it is not a principled decision that addressed itself to the proposition that unless the *federal* right is protected in the state proceeding it is lost forever. The opinion in that case was concerned with maintaining the vitality of state investigations. Not once did it mention *Feldman* v. *United States, supra,* nor address itself to the dilemma created by that decision. Nowhere does it explain how in light of *Feldman* v. *United States* the *federal* right can be protected and the vitality of state investigations also maintained. I have said enough to indicate that both cannot be done by affirming these judgments. As long as *Feldman* v. *United States* stands on the books, the state courts should be required to recognize the *federal* right against self-incrimination—lest it be lost forever.